IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:11.08.2006

CORAM

THE HON'BLE MR.JUSTICE V. DHANAPALAN

W.P. No.9674 of 2006 &
W.P.M.P. Nos. 10770 and 10771 of 2006 &
W.V.M.P. Nos. 908 and 1126 of 2006

C. Jayanthi ...Petitioner

Vs.

1. The Commissioner
Mettur Municipality
Mettur Dam
Salem District

2. Eswari ...Respondents

R2 impleaded as per order of Court dated 5.7.2006
by MJJ in WPMP 16337/06 in WP.9674/2006

Writ petition filed under Article 226 of the Constitution of India praying for a writ of certiorarified mandamus as stated therein.

For petitioner : Mr. P. Valliappan
for Mr. Anna Gandhi

For R1 : Mr. D. Krishnakumar

For R2 : Mr. P. Mani

O R D E R

By consent of both sides, the writ petition itself is taken up for final disposal.

2. The prayer in the writ petition is for issuance of a writ of certiorarified mandamus calling for the records of the first respondent relating to the short term Re-tender Notice in Na.Ka.No.8802/2005/A3 dated 31.03.2006 and quash the same and consequently direct the first respondent to award the tender to the petitioner pursuant to the tender notice in Na.Ka.No.8802/2005/A3 dated 27.03.2006 in respect of collecting charges in the "Mettur Camp Daily Market".

3. The case of the petitioner, in brief, is as follows:

a. The first respondent (Municipality) issued a tender notice dated 02.01.2006 in respect of various rights, including collection of fees in Mettur Camp Daily Market for the period from 01.04.2006 to 31.03.2007 as per the resolution no.443 dated

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28.12.2005. As there was no participant in the tender, fresh tender notices were issued on 07.02.2006 and 23.02.2006 and since the third tender notice also did not evoke any response from the bidders, the fourth tender notice was issued on 20.03.2006 for which, the bids were very low and thereafter, the Municipality finally issued a short term final re-tender notice dated 27.03.2006 in proceedings in Na.Ka.No.8802/2005/A3. The petitioner participated in the tender process and was successful in the bid and she remitted a sum of Rs.3 lakhs being the Earnest Money Deposit and Rs.5,60,501/- being the half of the bid amount of Rs.11,21,001/- which have been duly acknowledged by the Municipality. The only stage which remained was the allotment of tender rights by the first respondent to the petitioner. That being the position, the petitioner was shocked to see a fresh re-tender notice dated 31.03.2006 and that too on the same day on which she made the payment of the EMD and also half of the bid amount.

4. Aggrieved by this action of the Municipality, the petitioner has filed the present writ petition and her main grounds of challenge are that:

a. the fresh re-tender notice is ex-facie illegal as the first respondent, having accepted the Earnest Money Deposit and half of the bid amount, the Municipality cannot issue tender notices one after another.

b. the Municipality had not offered any explanation for cancellation of the tender in which the petitioner was a successful bidder

c. the action of the Municipality in issuing tender notices one after another is marked by non-application of mind particularly when no reason has been given for such action.

5. This Court, by order dated 05.04.2006, on consideration of the case of the petitioner, granted interim stay of auction in respect of Item No.2 of the impugned tender notice dated 31.03.2006 for a period of two weeks and ordered notice to the respondents and the same was extended on 28.04.2006 till 12.06.2006 and on 30.06.2006, the order of stay was once again extended upto 05.07.2006.

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6. On the other hand, the Municipality has filed its counter along with Vacate Stay Petition and its case is as follows:

a. the Municipal Council of Mettur Municipality, vide its Resolution No.443 dated 28.12.2005, decided to grant licence for 2006-2007 for the properties belonging to the Municipality based on which, publications were issued for grant of licence through tender-cum-public auction to collect fee at Mettur Camp Daily Market and 13 other items on 02.01.2006 wherein it was clearly mentioned that sealed tenders would be accepted till 11 a.m. on 07.02.2006 and public auction would be held in respect of all items at 11.30 a.m. Since nobody participated in the auction and no tender form was received, a notification was issued on 07.02.2006 for re-auction to be conducted on 23.02.2006 and one Eswari alone submitted the tender form quoting Rs.7,21,009/- in

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respect of Mettur Camp Daily Market which was lower than that of the previous year. Therefore, it became necessary to issue fresh notification for the conduct of auction on 07.03.2006 and since election schedule was announced and no instructions were received, the auction was postponed and a notification was issued on 20.03.2006 regarding the receipt of sealed tenders on 27.03.2006 till 11 a.m. and conduct of public auction at 11:30 a.m. and since the amount quoted on that date was lower than the average of the preceding three years, the first respondent had cancelled the auction as per tender condition no.6(a). Again, on 27.03.2006, a notification was issued for receipt of sealed tenders till 11 a.m. on 30.03.2006 on which day the petitioner had quoted Rs.11,21,001/- which was the highest.

b. Since tender condition no.18(a) provides for re-auction if any person is willing to pay an additional amount of 10% of the highest bid within a period of two days from the date of auction and invoking the same, the second respondent made an application to the Municipality stating that she is willing to pay an additional amount of 10% of the highest bid and also deposited on 30.03.2006, 50% of the amount calculated by adding 10% to the highest bid and it is its right either to accept the application for re-auction or to reject the same.

c. In the meanwhile, the Chief Electoral Officer, by his letter dated 04.03.2006 had informed Municipality to constitute an official committee to grant licence upto a period of one year and the meeting of the municipal council should not be convened for deciding the issue of granting licence due to impending election. In such circumstances, the application of the second respondent was placed before the official committee and the said committee decided to conduct re-auction and accordingly, a notification was issued on 31.03.2006 inviting sealed tenders upto 11 a.m. on 05.04.2006 and also a public auction will be conducted on the same day at 11.30 a.m. Tender forms were received and sealed tenders were opened as per the schedule and in the auction, the second respondent had bidden for a sum of Rs.14,05,009/- which was the highest bid. The above re-auction was conducted only in order to fetch higher revenue to the Municipality and meanwhile, the petitioner has approached this Court and obtained an order of stay of confirmation alone. The tender forms were opened as per tender schedule but the telegram issued by the petitioner's counsel was received only at 4.00 p.m.

7. The main contentions of the Municipality are that:

a. the petitioner had no right for grant of licence because as per the tender condition 13(a), the petitioner paid 50% of the bid amount immediately but tender condition 13(c) makes it clear that such deposit will not mean that the tenders will be confirmed in her favour and the Municipality has every right either to confirm the tender or to reject the tenders without assigning any reason and to conduct fresh auction.

b. further, tender condition 18(a) provides for re-auction if any person makes an application for payment of an additional amount of 10% of the highest bid and as such, it has every right to go for re-auction and hence, no malafide can be attributed since the re-auction was conducted only in the interest of the

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Municipality and moreover, the period of tender was also mentioned in the notification.

c. the earlier auction conducted on 30.03.2006 was cancelled only in order to fetch higher revenue to the Municipality on the basis of application made by the second respondent and the tender schedule for the auction-cum-tender held on 05.04.2006 was sent to the petitioner and if she was really interested, she could have participated in the tender.

d. the petitioner has filed the writ petition out of rivalry and the highest bid quoted on 05.04.2006 was by the second respondent for a sum of Rs.14,05,009/- which is higher than the preceding year's licence amount by Rs.4,09,021/- and

e. in view of the interim stay granted by this Court, confirmation order could not be passed in favour of the successful bidder and hence, prayed that the order of interim stay has to be vacated.

8. Similarly, the second respondent also has filed her counter along with a Vacate Stay Petition and her main contentions are as follows:

a. as per the said re-tender notice, auction was conducted on 05.04.2006 and she quoted an amount of Rs.14,05,009 which is the highest and also deposited a sum of Rs.10,02,510/- and the tender is subject to confirmation by the Municipalilty and

b. there is no merit in the writ petition and the petitioner has no vested right in the tender and it is the discretion of the Municipality to accept or reject the bid called for re-tender so as to get more revenue and there is no valid reason to stall the said tender process and therefore, the order of interim stay granted by this Court has to be vacated and the writ petition has to be dismissed.

9. Heard Mr. P. Valliappan for Mr. V.R. Anna Gandhi, learned counsel for the petitioner and Mr. D. Krishna Kumar for the Municipality and Mr. P. Mani for the second respondent.

10. It is not in dispute that the right to collect fee from Mettur Camp Daily market was put to public auction by the first respondent Municipality. It is also not in dispute that the second respondent was the highest bidder in the re-auction held on 30.03.2006 and her bid was not confirmed and the contract was not awarded in her favour. The learned counsel for the petitioner would contend that after the auction was over and in the tender process, the petitioner was the successful bidder in the short-term final re-tender notice dated 27.06.2004 which is prior to the impugned proceedings and she had also remitted the Earnest Money Deposit and half of the bid amount. Therefore, instead of awarding the contract in her favour, the Municipality has resorted to another notification which is mala fide and without assigning any reason and cancellation of the tender in which the petitioner was a successful bidder would amount to arbitrary action and it is marked by non-application of mind and opposed to principles of natural justice.

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11. Per contra, the learned counsel for the Municipality has strenuously contended that as per tender condition nos.13 and 18, the respondent Municipality is entitled to conduct re-auction and payment of 50% by the petitioner will not confer her any right for confirmation of the tender and it is the responsibility of the Municipality to fetch more revenue and that is the main reason to conduct re-auction. He has further contended that the petitioner has no vested right in the matter of tender and it is the discretion of the Municipality to accept or reject the bid and as such, the petitioner is not correct in approaching this Court to stall the tender process, thereby affecting the interest of the second respondent who is the highest bidder and on any event, the order of interim stay granted by this Court has to be vacated.

12. It is a well settled principle laid down by the Supreme Court and this Court that contracts by the State, its Corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality, with all relevant details such as date, time and place of auction, subject matter of auction, estimated cost, Earnest Money Deposit, etc. The main background of the award of the Government contracts through public auction/public tender is to ensure transparency, in the public procurement, to maximise economy and efficiency in Government procurement, to promote health competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government, where the procurement is available from a single source only, where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists, where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed and such contracts may be awarded through private negotiations.

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13. In the instant case, the Municipality has issued a notification on 31.03.2003 mentioning that sealed tender forms will be received upto 11 a.m. on 05.04.2006 and a public auction will be conducted by 1.30 p.m. On that day, sealed tenders were opened as per schedule in which the second respondent had bidden for a sum of Rs.14,05,009/- which was the highest bid. It is seen that as per resolution no.443, the tender notice dated 02.01.2006 was issued and further, a fresh tender notice dated 07.02.2006 was issued and also another tender notice dated 23.02.2006 was also notified and since the three tender notices did not evoke any response from the bidders, the fourth tender notice was issued on 20.03.2006 in which the petitioner was a successful bidder and had bidden an amount of Rs.11,21,001/-.

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Now, what is to be decided is whether the Municipality can proceed in accepting an application from the second respondent who is willing to pay an additional amount of 10% of the highest bid within two days from the date of auction after receiving 50% of the bid amount from the petitioner along with Earnest Money Deposit and after having issued a receipt for the same.

14. Since the impending election was there and as the Municipality had no instruction, the application of the second respondent was placed before the official committee and that committee decided to conduct re-auction in which the second respondent has bidden for Rs.14,05,009/-. As per tender condition 13(a), the highest bidder has to deposit 50% of the bid amount immediately and accordingly, the petitioner deposited 50% of the bid amount. However, it is clear that such a deposit will not mean that the tenders will be confirmed in her favour and the Municipality has every right to confirm the tender or to reject it without assigning any reason and to conduct a fresh auction. Also, at the cost of repetition, it is seen that tender condition 18(a) provides for re-auction if any person makes an application for payment of an additional amount of 10% of the highest bid within two days, the Municipality can conduct re-auction with a view to get more revenue. In that view of the matter, the first respondent has proceeded as per the conditions of the tender. On the strength of the above clause in the tender conditions and the power vested with the Municipality, the action of the first respondent cannot be said to be arbitrary or unjustifiable.

15. In this context, the learned counsel for the Municipality has relied on a First Bench judgment of this Court reported in 2005 WLR 30 in the case of Selvarani Vs. The Commissioner, Karaikudi Municipality and Another, in which it is observed as under (paras 18 and 19)

> "Similarly, in Food Corporation of India Vs. Kamdhenu Cattle Feed Industries (AIR 1993 SC 1601), the Supreme Court observed that the highest tenderer can claim no right to have his tender accepted, although this power to reject the highest tender should not be exercised arbitrarily.
>
> In the circumstances, we cannot issue a mandamus to the first respondent to accept the bid of second respondent / V. Ashokan, even though he was the highest bidder. All that we can direct is that the bid of the highest bidder should not be rejected arbitrarily, but for some good reason."

16. Every action taken by the Government must be in public interest and its action would be liable to be invalidated on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid, as held by the Supreme Court in R.D. Shetty Vs. International Airport Authority of India reported in AIR 1979 SC 1628.

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17. Further, it is worth citing here, the judgment of the Apex Court in the case of Ram & Shyam Co. Vs. State of Haryana reported in (1985) 3 SCC 267 in which the relevant portion reads as under: (para 12)

> "On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz., the welfare State may be able to expand its beneficent activities by the availability of larger funds. . ."

18. In yet another judgment reported in 1981 Supp. SCC 85 in the case of State of U.P. Vs. Shiv Charan Sharma, the Apex Court has observed thus:

> "... public auction with open participation and a reserved price guarantees public interest being fully subserved."

19. In this case, the Municipality has acted keeping in mind its revenue prospects and the welfare of the public at large. Further, the second respondent has availed of the option which is provided under tender condition 18(a) and in such a view of the matter, the contention of the petitioner that the Municipality cannot go on calling tenders one after another does not hold good in view of the specific tender conditions as well as the power of the Municipality to go for re-auction.

20. In the light of the discussion made above and in view of the rulings of the Supreme Court as well as this Court (cited supra), I am of the considered view that the action of the Municipality in issuing short-term re-tender notice cannot be said to be arbitrary and unjustifiable and as such, the writ petition deserves no consideration and it is liable to be dismissed. Accordingly, it is dismissed. No costs.

Further, it is ordered that the Municipality is free to proceed with the tender process and award the contract to the highest bidder and it is made clear that whatever the amount deposited by the petitioner to the Municipality has to be refunded by the latter to the former with interest as per the procedure contemplated. In view of the dismissal of the writ petition, connected W.P.M.Ps. and W.V.M.Ps. are closed.

cad

Sd/

Asst.Registrar

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Sub Asst.Registrar

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To

The Commissioner
Mettur Municipality
Mettur Dam
Salem District

+ 1 cc to Mr. P. Mani, Advocate SR No. 36380

+ 1 cc to Mr. D. Krishna Kumar, Advocate SR No.36192

+ 1 cc to Mr. V. R. Annagandhi, Advocate SR No.36068

Order in

W.P. No.9674 of 2006

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SR/28.8.2006

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